Supreme Court, U.S.
FILED
JAN 24 1997
CLERK

Nos. 96-903, 96-919

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS TERM LIMITS, ET AL.,
Petitioners,

v.

EUGENIA T. DONOVAN,
Respondent.

STATE OF ARKANSAS,
Petitioner,

v.

EUGENIA T. DONOVAN, ET AL.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT EUGENIA T. DONOVAN IN OPPOSITION

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January 24, 1997

QUESTION PRESENTED

Whether a state constitutional provision instructing state legislators to take specified actions to pass a proposed amendment to the United States Constitution violates Article V of the Constitution.

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Respondent Eugenia T. Donovan respectfully requests that this Court deny the petitions for a writ of certiorari to review the decision and judgment of the Supreme Court of Arkansas entered on October 21, 1996, and the mandate of that court issued on October 28, 1996.

COUNTERSTATEMENT

A. The Arkansas Initiative

Both petitions are far too modest about the purposes and effects of Amendment 9 to the Arkansas Constitution. Amendment 9 is not merely "[voters] expressing their views through the initiative process" (96-919 Pet. 4), and it is surely not "nonbinding" (96-903 Pet. i *et passim*). Amendment 9 is a permanent, detailed set of state constitutional "instructions" to present and future state legislators and Members of Congress from Arkansas as to how they shall vote, under every circumstance its drafters could think of, with respect to a specific potential amendment to the U.S. Constitution. If it is valid, then state legislators and Members of Congress who fail to follow these instructions are breaking state law.

Amendment 9 sets forth the full and exact text of a potential amendment to the Constitution (called the "Congressional Term Limits Amendment"; hereinafter, "CTLA") fixing term limits for service in Congress. In general, CTLA provides that no person may serve more than three terms in the U.S. House of Representatives (except that incumbents may serve not more than two additional terms); that no person may serve more than two terms in the U.S. Senate (incumbents may serve one additional term); and that there shall be "no time limit" for ratification by three-fourths of the states.

Amendment 9 commands both state legislators and Members of Congress to take specific steps to add CTLA to the Constitution. With respect to Members of Congress, it first provides, in general, that each Member from Arkansas "'is hereby *instructed to use all of the powers of the Congressional office to pass the Congressional Term Limits Amendment* set forth . . . above.'" Pet. App. A7 (emphasis added by Arkansas

Supreme Court).[1/] It then details these "instruct[ions]," directing Members, *inter alia*, "to vote in favor of [CTLA] when brought to any vote" (*id.*); "to second [CTLA]" (*id.* at A8-9); and to take specified actions to bring CTLA out of committee for a vote of the full House or Senate (*id.*). Moreover, Amendment 9 forbids Members from supporting competing term limits proposals, directing them to vote *against* any term limits proposal with longer term limits. *Id.*

Amendment 9 also commands the whole Arkansas legislature to apply to Congress to call a constitutional convention under Article V: both houses of the state legislature "'are *hereby instructed to make the following application to the United States Congress* [the required application is then set forth verbatim]'" (Pet. App. A9)(emphasis added by Arkansas Supreme Court). Amendment 9 then details these "instruct[ions]," directing Members, *inter alia*, "to vote in favor of the application" (*id.* at A9); "to second the application" (*id.*); to vote to bring the application before committees or subcommittees and to bring it to a vote of the full legislative body (*id.* at A9-10); "to vote against any attempt to delay, table, or otherwise prevent a vote . . . on the application" (*id.* at A10); "to vote against any change" in the application" (*id.*); and "to vote in favor of [CTLA when] sent to the states for ratification" (*id.*). Like Members of Congress, state legislators are instructed to vote *against* any constitutional amendment with longer limits. *Id.* at A10-11.

Amendment 9 then says that any Member of Congress or state legislator who fails to follow any of these instructions shall have the words "DISREGARDED VOTER

[1/] References to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari in No. 96-919.

INSTRUCTION ON TERM LIMITS" printed in capital letters adjacent to his or her name on every future primary, general election, and special election ballot. *Id.* (capitals in original). The Secretary of State, an elected official, is "responsible for making an accurate determination as to whether a candidate for state or federal legislative office" shall be so branded. Pet. App. A11. The brand is apparently to be applied regardless of how long after 1996 the disobedience occurs, and in every election for the remainder of the legislator's political life, apparently even after CTLA has been added to the Constitution.

On its face, the label "DISREGARDED VOTER INSTRUCTION," with its message of disdain for voter sentiment, is a blunt and potentially very misleading instrument. There is no ballot space for an explanation that, for example, (i) the legislator's own district constituents favor what the legislator did; or (ii) the voters of Arkansas, given only a yes/no vote on a 4 1/2-page amendment, do not necessarily favor all the features of it, such as calling a constitutional convention and opposing competing term limits proposals; or (iii) the legislator believes voter sentiments have changed since 1996.

B. Decision Below

Respondent Donovan brought an original action in the Arkansas Supreme Court, alleging that the people of Arkansas do not have power to adopt Amendment 9. The court agreed, ruling that Amendment 9 is beyond the powers of the people under Amendment 7 to the state constitution because it contravenes Article V of the U.S. Constitution. Pet. App. A18.

The Arkansas Supreme Court did not rule, as the State's petition implies (96-919 Pet. 4), that Article V bars "the people

of the several states . . . from expressing their views through the initiative process in favor of particular constitutional amendments." On the contrary, the court carefully distinguished between initiatives that merely "express [voters'] views" for the guidance of legislators and initiatives that foreclose legislators' independent deliberations and decisions by ordering them to act in a specified way.

The court (which was of course interpreting a proposed *state* constitutional provision), held that Amendment 9 sets forth a binding command, enforced through state-imposed sanctions. The court said,

> It is clear from the aforementioned provisions that the proposed Amendment 9 . . . *directs* both state and federal legislators [to act in favor of CTLA]. The proposed Amendment 9 also *directs* the General Assembly to . . . ask the United States Congress to call a constitutional convention. The proposed Amendment 9 essentially provides for a vote of the people [rather than the legislature] to initiate the application process for a constitutional convention.

Pet. App. A11 (emphasis added). The state court explained further:

> Clearly, the proposed Amendment 9 is nothing more than a coercive attempt to compel the Arkansas General Assembly to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of

> whether such action is in the best interest of all the people of this state. This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told. Although the proposed Amendment 9 does not compel such action by the legislature on threat of loss of salary, it is nonetheless *binding* on the legislators
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> . . . .

Pet. App. A17 (first emphasis in original; second emphasis added). The Court repeated for emphasis, "The proposed Amendment 9 would virtually tie the hands of the individual members of the General Assembly . . . [who] would no longer be part of a deliberative body acting independently in exercising their individual best judgments on every issue." Pet. App. A17.

Turning to the question of whether these state commands violate Article V, the Arkansas Supreme Court carefully examined the precedents in this Court, the lower federal courts, and state courts, and it discerned a clear line of distinction. Initiatives and referenda that are merely "advisory" (Pet. App. A13), providing "nonbinding communication" (*id.*) as to the people's positions on proposed amendments to the U.S. Constitution, are proper. But initiatives and referenda that *command* legislatures to take specific action on constitutional amendments violate Article V, because the Framers deliberately gave the amendment functions to state and federal legislatures, not to the people of the states. Finding that Amendment 9 "clearly" (Pet. App. A17) fell on the wrong side of that line, the court ruled that it would violate Article V.

The Arkansas Supreme Court enjoined the Secretary of State from placing the initiative on the ballot. On November 2, 1996, this Court stayed the state court's decision pending consideration of petitions for certiorari.

ARGUMENT

The Arkansas court held that Amendment 9 violates Article V because it takes decisionmaking authority with respect to a specific U.S. constitutional amendment away from the state legislature, replacing its deliberative processes with fixed state constitutional "instructions" that are both legally binding and enforced by state sanctions. The Arkansas court carefully distinguished between measures that make such binding commands and measures that merely advise or inform legislators as to the positions of the voters. Its decision is consistent with the text of Article V and the decisions of this Court and all other appellate courts (with the arguable exception of one 63-year-old state-court "advisory opinion," *see infra* p. 16) and presents no issue warranting this Court's review. Moreover, Amendment 9 has other infirmities, not yet considered because this was a pre-election proceeding, including the facial unfairness and inaccuracy of the capitalized label, that make this an inappropriate case to consider the role of popular initiatives in the amendment process.

A. The Arkansas Supreme Court's Interpretation of Amendment 9 as a Command With the Force of Law Is Correct and in Any Event Dispositive.

The Arkansas Supreme Court did not hold that Article V "leave[s] the people and the popular-initiative process . . . entirely out of the federal amendatory process." 96-919 Pet. 5.

The court held, rather, that "the people" cannot take their legislatures out of the Article V process by engraving detailed binding instructions in a state constitution. The court's decision does not prevent Arkansas voters from expressing their views on term limits, insisting that candidates state their views and disclose their voting records, and voting against candidates whose views or records do not meet their approval. *See* Pet. App. A17.

The Arkansas Supreme Court's interpretation of Amendment 9 as "binding" (Pet. App. A17) is fully justified by the text of the amendment. As the court said, "This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told." Pet. App. A17 (emphasis in original). A state legislator who violates those instructions is, on the face of it, violating the supreme law of the state and his or her oath to uphold the state constitution, Ark. Const. art. 19, § 20. The state supreme court's interpretation of that constitution is of course dispositive. *See Smiley v. Kansas*, 196 U.S. 447, 455 (1905); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).[2/]

Petitioners argued in the Arkansas Supreme Court, and repeat in this Court despite the state court's ruling, that the "instructions" are actually "nonbinding" under state law because the only penalty is to have "DISREGARDED VOTER

[2/] If the initiative had called merely for an advisory expression of voter sentiment regarding CTLA, it would not have been authorized as a matter of state law under Amendment 7 to the Arkansas Constitution, under which its proponents proceeded. That Amendment provides, in pertinent part, "the people reserve to themselves the power to propose legislative measures, laws and amendments to the [state] Constitution." *See* Pet. App. A3. The initiative would not have complied with Amendment 7 unless its purpose had been to amend the written positive law of the state.

INSTRUCTIONS ON TERM LIMITS" placed next to one's name on all future election ballots. At best this is a very red herring. The instructions are stated in mandatory terms. A state legislator (or Member of Congress) who violates them is disobeying the Arkansas Constitution. Conscientious legislators do not violate specific constitutional commands, whether the penalty is heavy or light.

Moreover, the threat of being identified by the Arkansas Secretary of State as having "DISREGARDED VOTER INSTRUCTIONS ON TERM LIMITS" plainly is, as the Arkansas Supreme Court said, "extortive" rather than educational. Pet. App. A17. As that court held, the brand is "equivalent to an officially sanctioned recommendation by the State of Arkansas not to vote for such candidates because they disregarded the instructions and wishes of the voters." *Id.* Moreover, considered as a disclosure, the phrase is highly misleading: a legislator who disobeys one of Amendment 9's commands may not be ignoring voter sentiment at all. For example, a state legislator may well have OBEYED THE WISHES OF VOTERS IN HIS DISTRICT, but there is no equivalent opportunity to say so.[3/] A Member of Congress or

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[3/] In his Chambers Opinion in *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), Justice Rehnquist wrote with greater precision:

> If each member of the Nevada legislature is free to obtain the views of constituents *in the legislative district which he represents*, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort.

Id. at 1388 (emphasis added). We do not mean to enter into the complex questions of where a legislator's loyalties properly lie, or the right of a state to resolve issues on a statewide referendum basis. Our only point is that the label as written is so misleading as to be obviously punitive, because a

(continued...)

state legislator who votes *for* an alternative term limits proposal (which Amendment 9 commands her to oppose) may have OBEYED THE WISHES OF VOTERS WHO ALSO SUPPORT LONGER TERM LIMITS PROPOSALS.[4] And the implication that the voters of Arkansas favor CTLA may be wholly false on some future date when the legislator acts, or in 1998 (or 2098) when the label is applied. Thus, for any number of reasons, a legislator may be branded for "DISREGARD OF VOTERS" without contravening voter wishes at all: what he or she would have violated is the command embedded in the state constitution.

B. The Arkansas Supreme Court's Interpretation of Article V Is Correct and Consistent With This Court's Decisions.

The Arkansas Supreme Court ruled that Article V does not permit a state to allow its people directly to dictate state ratification of amendments to the U.S. Constitution, or state applications for a constitutional convention, although the

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[3] (...continued)
legislator who votes against CTLA could be obeying the wishes of a majority — or even 100% — of his or her own constituents.

[4] There has been a struggle within the term limits movement as to the appropriate limits, with some proponents favoring allowing longer but still limited service. *See, e.g.*, David Hess, "Gingrich Pledges To Fight Term Limits of Less Than 12 Years," *Phila. Inquirer*, Jan. 12, 1995, at A9 (describing disagreements among advocates of six-, eight-, and twelve-year limits for U.S. Representatives). Obviously, one faction succeeded in inserting its particular view into Amendment 9. Arkansas voters were given only a yes/no choice on the whole detailed Amendment. There is no reason to assume that voters who supported Amendment 9 would have voted "no" on a different term limits proposal, or that legislators who vote "yes" on such a proposal are disregarding actual voter sentiment.

people may of course express their views on these subjects in a nonbinding fashion. This ruling was correct: Article V assigns responsibility for ratification and convention applications to state "Legislatures." The state court's distinction between a command and a nonbinding expression of voter opinion is fully consistent with the constitutional text and the pertinent cases.

Article V provides that a constitutional amendment proposed by two thirds of both Houses of Congress becomes effective "when ratified by the Legislatures of three fourths of the several States"; Article V further provides that "on the Application of the Legislatures of two thirds of the several States," Congress shall call a Convention for proposing Amendments.

As the Arkansas court noted (Pet. App. A12), this Court squarely held long ago that Article V uses the term "Legislatures" in its ordinary sense, well understood in 1787, to refer to a state's representative lawmaking body or bodies. In *Hawke v. Smith*, 253 U.S. 221 (1920), the issue was whether the Ohio General Assembly's ratification of a proposed amendment to the U.S. Constitution could be subjected to a popular referendum, as required by the Ohio constitution. The Court's answer was no. The Court held that the term "Legislatures" is to be given its plain meaning:

> The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "*Legislatures*"? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of

> interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning.

Id. at 227. The Court noted that the Framers' use of the word "Legislatures" was not casual but reflected a careful distinction between action of a representative body and direct action by the people of a state:

> The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people
>
> . . . .

Id. But the Framers deliberately decided against that course:

> There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose.

Id. at 228. The Framers wanted, as the Court noted, to assure that the function of amending the Constitution was committed to deliberative bodies. *See id.* at 226 (purpose of assigning amendment role to Congress and state legislators was to "secur[e] deliberation and consideration before any change can be proposed").

The *Hawke* Court then addressed the question whether the State was nevertheless free to allocate the ratification power to the people as a whole acting directly, as the state could with

respect to state legislative power. The Court answered that question in the negative, because the task of ratification is *not* a state legislative power, which the people of the state are free to allocate, but a task created by the Constitution itself and assigned directly to state "Legislatures":

> [R]atification by a state of a constitutional amendment is not an act of legislation . . . .
>
> . . . .
>
> It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.

Id. at 229-30. *See also id.* at 227 ("It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.").

Finally, a state cannot evade Article V by having its legislature carry out the bare formalities of ratification or "Application" under the specific and legally binding command of a "direct action of the people." This follows from *Leser v. Garnett*, 258 U.S. 130 (1922), which held that the 19th Amendment had been validly adopted even though "the constitutions of several of the [ratifying] states [contained] provisions which render inoperative the alleged ratifications by their legislatures." *Id.* at 137. The Court said,

> [T]he function of a state Legislature in ratifying a proposed amendment to the

> – Federal Constitution, . . . is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.

Id.[5] As the California Supreme Court explained in *AFL-CIO v. Eu*, 686 P.2d 609, 620 (1984), "If a state cannot constitutionally prohibit its legislature from proposing or ratifying a constitutional amendment, by implication it cannot compel the legislature to do so."

C. The Arkansas Supreme Court's Decision Does Not Conflict With Other Appellate Decisions.

In sum, the Arkansas Supreme Court ruled that Amendment 9 is invalid as "nothing more than a coercive attempt to compel the Arkansas General Assembly to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of whether such action is in the best interest of all the people of this state." Pet. App. A17. It distinguished Amendment 9 from "merely a nonbinding attempt to communicate the desire of the people for term limits," *id.*, and plainly would not have invalidated the latter.

This distinction is consistent with a large number of federal and state precedents, many of which the state court examined and discussed. For example, Justice Rehnquist, in his Chambers Opinion in *Kimble v. Swackhamer*, 439 U.S. 1385

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[5] *Cf. U.S. Term Limits, Inc. v. Thornton*, — U.S. —, 115 S. Ct. 1842, 1855 (1995); *id.* at 1875 (Kennedy, J., concurring). The process of ratifying amendments to the Constitution, like the process of electing Members of Congress, is a process created and provided for by the Constitution itself.

(1978), drew the same distinction in declining to grant relief against a Nevada "advisory question to the registered voters of the State as to whether the Equal Rights Amendment should be ratified by the legislature." *Id.* at 1386. Noting that the state referendum expressly provided that "'the result of the voting on this question does not place any legal requirement on the legislature or any of its members,'" *id.*, the Justice distinguished *Hawke* and *Leser* and said "I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort." *Id.* at 1388.[6/]

In *AFL-CIO v. Eu*, *supra*, the California Supreme Court drew the same distinction within a single initiative. It invalidated a portion of the initiative stating that "The People of the State of California hereby mandate that the California Legislature adopt the following [Application to Congress to call a constitutional convention to consider a balanced budget amendment]," 686 P.2d at 612, ruling that "pro forma action by a state legislature, acting under compulsion of an initiative measure, is [not] sufficient to comply with article V." *Id.* at 620. But it held that a separate portion of the initiative "which merely petitions Congress to adopt a balanced budget amendment" was valid. *Id.* at 622.

Other cases are consistent. *See, e.g., Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996) (voter initiative "directing" state legislature to apply for constitutional convention regarding term limits violates Article V); *State ex*

[6/] The Nevada Supreme Court also approved the referendum only because it was expressly advisory. *See Kimble v. Swackhamer*, 584 P.2d 161, 162-63 (Nev. 1978). The court made clear it would not have done so had the referendum been binding. "Limitations upon legislative power to ratify or refuse to ratify a proposed federal amendment likewise are in violation of Article V." *Id.* at 162 n.2.

rel. Harper v. Waltermire, 691 P.2d 826, 830 (Mont. 1984) (initiative amending state constitution to direct legislature to call for convention on balanced budget amendment and sit in perpetual session until it does is invalid; "whenever a state legislature acts to amend the United States Constitution . . . the body must be a deliberative representative assemblage acting in the absence of any external restrictions," and initiative that "attempts to direct and orchestrate" process violates Article V); *State ex rel. Tate v. Sevier*, 62 S.W.2d 895 (Mo. 1933) (invalidating bill authorizing popular conventions to pass on legislature's ratification of amendments); *Barlotti v. Lyons*, 189 P. 282 (Cal. 1920) (refusing to allow voter referendum on conclusiveness of legislature's ratification of Eighteenth Amendment); *Decher v. Vaughan*, 177 N.W. 388 (Mich. 1920) (same).

Petitioners lay great stress on one arguably contrary opinion, *In re Opinion of the Justices*, 148 So. 107 (Ala. 1933). In proposing the 21st Amendment for ratification by the states, Congress exercised its Article V power to call for ratification by state conventions rather than state legislatures. A proposed Alabama statute would have required that delegates to that state's convention pledge to follow the result of a statewide vote. The Alabama court rendered an advisory opinion that this provision would be constitutional, stating in essence that such delegates should reflect popular sentiment. This advice dealt with a situation quite different from the present case: it covered a one-time advance pledge on a yes/no question, and the pledge was part of the *ad hoc* groundrules devised for the conduct of a special state convention; it is by no means clear that the Alabama court would have given the same advice with respect to permanent commands in the state's constitution, addressed to the state legislature, applicable without regard to

any precise correspondence to voter sentiment, and enforced by a state sanction. But in any event, this unlitigated advisory opinion, which could not have been reviewed in this Court and has been distinguished by later decisions,[7] does not create a conflict that requires this Court's resolution.

D. The History of Referenda Furthering Popular Involvement in the Election of Senators Is Not Inconsistent With the Arkansas Supreme Court's Decision.

The private petitioners suggest that the Arkansas Supreme Court's ruling "is at odds with a well-established tradition of nonbinding instructions by voters to their elected officials" (96-903 Pet. 14), citing several states' turn-of-the-century efforts to encourage state legislators to follow popular recommendations when choosing United States Senators. But the Arkansas Supreme Court rejected no such principle; on the contrary, as noted above, the court recognized that nothing would bar "a mere advisory referendum or a nonbinding communication between legislators and citizens." Pet. App. A13. The court invalidated Amendment 9 because it found the amendment's instructions, backed by the sanctions of the Secretary of State, to be binding.

The historical evidence petitioners cite is inapposite. Before the 17th Amendment was adopted, various state popular initiatives sought to encourage state legislatures to exercise their Article I, Section 3 power to select candidates favored by the people. But none of these initiatives contained instructions to propose, ratify, or make "Application" with respect to the

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[7] *See, e.g., AFL-CIO v. Eu*, 686 P.2d at 705-06.

17th Amendment itself, and none presented or could have presented any question under Article V. This Court decided *Hawke v. Smith*, *supra*, in 1920, just seven years after the 17th Amendment was ratified. Far from endorsing any popular role in the formal adoption of that Amendment, the Court said, "It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote." 253 U.S. at 228. Amendment 9 to the Arkansas Constitution attempts to do exactly what the states at the turn of the century never did: order state legislators to take specified actions under Article V to bring about and pass a particular proposed constitutional amendment.

E. Amendment 9's Other Infirmities Make This Case an Inappropriate Vehicle for Considering the Proper Interpretation of Article V.

Under Arkansas law, in a *pre*-election proceeding, respondents could challenge Amendment 9 only on the ground that it was not within the scope of the state's initiative procedure. State and federal constitutional challenges to the merits of the proposal itself could not be brought until after the election.[8/]

Amendment 9 has other obvious infirmities. It allows one elected official, holding partisan office, to apply a crippling label to other candidates for office. It discriminates between candidates who have had actual occasion to violate one of its

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[8/] *See Plugge v. McCuen*, 841 S.W.2d 139 (Ark. 1992). The Arkansas court's ultimate holding in the present case was that the "procedure" set forth in Amendment 9 was not "encompassed within the powers reserved to the people of this state by Amendment 7."

many rules and candidates who may oppose term limits but have not had any opportunity to confront the rules. It imposes a lifetime barrier to election, which the Secretary of State does not have any official discretion to remove even if the candidate's view and conduct or the public circumstances have changed. It purports to "instruct" Members of Congress. And for reasons made clear at pp. 9-10, *supra*, the label "DISREGARDED VOTER INSTRUCTION . . ." is hopelessly inexact, misleading, and unfair.

Such a measure is vulnerable to a wide range of challenges under the Arkansas Constitution[2/] as well as the Time, Place and Manner Clause and the First and Fourteenth Amendments to the Federal Constitution. Election regulations are supposed to prevent "voter confusion," *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986), not enhance it. They are supposed to be "generally applicable and evenhanded," *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). And they are supposed to be nondiscriminatory. *See, e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tasjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

The very unfairness of Amendment 9 to state legislators and Members of Congress would necessarily distort the Court's consideration of the amendment's compliance with Article V. If the Court wishes to give further consideration to the proper role of state popular initiatives in bringing about the adoption of amendments to the Constitution, the Court should await a state initiative that is not so obviously vulnerable on a variety of other grounds.

2/ *See, e.g.*, Ark. Const. art. II, § 3 (equal protection); *id.* § 8 (due process); *id.* § 18 (equality of privileges and immunities).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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January 24, 1997